STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Court of Appeals
Shapiro, PJ, and Whitbeck and Stephens, JJ

DUSTIN ROCK,

Plaintiff-Appellee,

v.

DR. K. THOMAS CROCKER and
DR. K. THOMAS CROCKER, D.O., P.C.,

Defendants-Appellants.

Supreme Court No. 150719

Court of Appeals No. 312885

Kent County Circuit Court
No. 10-06307-NM

AMICUS CURIAE BRIEF
OF
THE BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN

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STATEMENT IDENTIFYING INTEREST AS AMICUS CURIAE

The Regents of the University of Michigan have constitutional authority to supervise and control the university. Const 1963, art 8, § 5. Accordingly, the Regents are responsible for establishing the mission, goals and objectives of the University of Michigan Health System and supervising its operation and activities.

The University of Michigan Health System includes:

- The University of Michigan Medical School and its faculty group practice with more than 2,000 physician members in 20 clinical departments;
- The University of Michigan Hospitals and Health Centers, comprising the University, C.S. Mott Children's, and Von Voigtlander Women's Hospitals, six specialty health centers, 40 outpatient health centers and 120 outpatient clinics throughout Michigan;
- The clinical activities of the University of Michigan School of Nursing; and
- The Michigan Health Corporation, the legal entity through which the University of Michigan Health System enters into partnerships, affiliations, joint ventures and other activities.

As one of the largest health care systems in the state, the University has a compelling interest in the state of the law affecting health care providers and institutions.

STATEMENT OF POSITION AS AMICUS CURIAE AND SUMMARY OF ARGUMENT

The order granting leave to appeal directed the parties to address two issues:

> (1) whether the lower courts erred in concluding that allegations relating to violations of the standard of care that the plaintiff's expert admitted did not cause the plaintiff's injury were admissible as evidence of negligence.
>
> (2) whether the Court of Appeals erred in holding that, if the defendant is a board-certified specialist, MCL 600.2169(1)(a) only requires an expert to be board certified in that same specialty at the time of the malpractice, and not at the time of trial.

While the University believes that the Court of Appeals erred in its interpretation of MCL 600.2169(1)(a),[1] as amicus curiae, the University of Michigan will only discuss the first issue.

Allowing evidence of alleged standard of care violations that are causally unrelated to a plaintiff's injury is wrong as a matter of law under the longstanding bar against propensity evidence. Evidence that a person was negligent on other occasions is not admissible to prove the person was more likely to be negligent when performing the act at issue in litigation. The Court of Appeals did not acknowledge or apply MRE 404(b)'s exclusion of other-acts evidence to prove propensity.

Enforcing the rule excluding propensity evidence is especially important in malpractice actions. A jury faced with deciding whether a physician breached the standard of care and caused injury to a patient has a difficult task. With few exceptions, jurors hear highly technical evidence about unfamiliar medical issues, along with conflicting expert opinions as to standard of care and proximate causation. Malpractice cases are hard enough without forcing the jury to take on the added burden of deciding whether a physician breached the standard of care in other ways unrelated to the plaintiff's injury.

As with any litigation, there is a fundamental public interest in having malpractice claims correctly decided. Keeping the jury focused on the dispositive question—whether the plaintiff suffered an injury that was proximately caused by a defendant's breach of the standard of care—is critical to reaching that goal. The University is concerned by the

[1] The question whether MCL 600.2169(1)(a) requires an expert witness to be board-certified at the time of testifying was presented in *Miller v Devaney*, Court of Appeals No. 309624 and *Miller v University of Michigan Regents*, Court of Appeals No. 309637. The cases were settled after briefing and oral argument. No opinion was issued by the panel.

prospect that jurors will decide cases based on their impression about whether or not a defendant is a good physician, rather than whether he or she negligently caused injury to the plaintiff. Left intact, the Court of Appeals' ruling would allow juries to impose damages awards in cases where there is *no evidence* that the treating physician's negligent conduct *caused* a plaintiff's injuries.

These undesirable consequences are bad enough in a fairly straightforward case like the one before this Court, and demonstrate the need to exclude propensity evidence in *all* malpractice cases. From its perspective as a major academic tertiary care center, the University of Michigan Health System views the concerns are especially troubling. The University's health care professionals are often confronted with the most complex illnesses and injuries. Many patients present difficult diagnoses and require treatment by teams of specialists and subspecialists over extended courses of care. The malpractice claims against the University and its employed providers typically involve medically dense questions, requiring focused efforts to educate the jury. Having to redirect energies away from the real issues to confront fringe allegations dealing with causally unrelated clinical judgments and actions would make that task all the more difficult.

As a safeguard against these concerns, the University suggests that this Court pronounce a bright-line rule excluding expert testimony about alleged breaches of the standard of care that are not causally related to the plaintiff's injury.

STATEMENT OF FACTS

Plaintiff alleges that defendant breached the standard of care by using a specific plate and screw configuration during surgery. He also alleges defendant was negligent by giving a post-operative instruction that the ankle could bear weight. Plaintiff and his

expert concede that the two alleged breaches were not a cause in fact of his claimed injuries.

ARGUMENT

I. Opinion testimony about alleged standard of care breaches that are causally unrelated to a plaintiff's injuries should be excluded as propensity evidence.

This Court has long followed "the general rule that evidence that a person has done an act at a particular time is not admissible to prove that he has done a similar act at another time." *Stranahan v Genesee Co Farmers' Mut Fire Ins Co*, 242 Mich 413, 415; 218 NW 688 (1928). The rule applies in negligence cases. *Phinney v Detroit U R Co*, 232 Mich 399, 405; 205 NW 124 (1925).

The venerable prohibition against propensity evidence is now embodied in MRE 404(b)(1), which states, "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Under this rule, evidence of other acts cannot be admitted to prove a party's propensity to commit the act at issue. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). "[I]f the proponent's only theory of relevance is that the other act shows defendant's inclination to wrongdoing in general to prove that the defendant committed the conduct in question, the evidence is not admissible.'" *People v Jackson*, 498 Mich 246, 258; __ NW2d __ (2015) (quoting *People v VanderVliet*, 444 Mich 52, 61-63; 508 NW2d 114 (1993), amended 445 Mich 1205; 520 NW2d 338 (1994).[2]

[2] MRE 404 applies in civil cases. *Jackson*, 498 Mich at 262 n 5.

A. Expert testimony about causally unrelated breaches of the standard of care is inadmissible propensity evidence under MRE 404(b)(1).

The Court of Appeals agreed "with the trial court that evidence of the course of defendant's violations of the standard of care, even if the violations did not directly cause plaintiff's eventual injury, may be relevant to the jury's understanding of the case." *Rock v Crocker*, 308 Mich App 155, 170; 863 NW2d 361 (2014). While the Court of Appeals did not specifically identify what the jury might understand from the expert's opinions, the trial court's opinion openly acknowledged the impermissible propensity reason for admitting the testimony. According to the trial court, the jury should "examine all the claims of the plaintiff" and decide whether defendant "breached the standard of care in a variety of multiple other ways . . . ." *Id*. at 169 (quoting trial court opinion). The Court of Appeals accepted the trial court's ruling that opinion testimony about causally unrelated breaches "is relevant because it makes a question of fact more likely than not, that is, that the doctor did not perform his duties as is required by the standard of care and that injuries [plaintiff] did suffer were a result of his breaches and that the claims of the plaintiff are meritorious and should be compensated." *Id*.

Allowing expert opinions about other alleged, but not causally related, breaches directly contravenes MRE 404(b)(1). As the Legislature has made clear, the only legally relevant conduct at issue in a malpractice action is a negligent act that causes the plaintiff's injury. MCL 600.2912a(2)("In an action alleging medical malpractice, the plaintiff has the burden of proving that he or she suffered an injury that more probably than not was proximately caused by the negligence of the defendant or defendants.") The other-acts

testimony that the courts below would allow involves separate alleged breaches of the standard of care that lack the relevant causal connection.

The "character-to-conduct inference" is explicit: because defendant was allegedly negligent in placing the plate/screw configuration or in saying the ankle could bear weight, the jury should infer that he was also negligent in other aspects of his care that caused plaintiff's injury. Rule 404(b)(1) explicitly prohibits courts from permitting that type of inference. And thus it is not surprising that neither the Court of Appeals nor trial court cited *any* authority supporting this part of their decisions. Such supporting authority is also tellingly absent from plaintiff's brief on appeal.

This Court has specifically held that trial courts may not admit propensity evidence under the guise of opinion testimony by a party's expert. In *People v Bynum*, 496 Mich 610; 852 NW2d 570 (2014), this Court considered the admissibility of opinion testimony under the related exclusion of character evidence in MRE 404(a). An expert was properly permitted to testify about the general characteristics of gang culture. *Id*. at 626-627. However, the expert "veered into objectionable territory" by stating that the defendant "acted in conformity with his gang membership with regard to the specific crimes in question." *Id*. at 630-631. The same detour into "objectionable territory" would occur if a plaintiff's malpractice expert is allowed to testify that a defendant breached the standard of care in a way that did not cause injury. Whether explicitly or implicitly, such an opinion would only be offered to persuade a jury that a defendant "acted in conformity" with his or her propensity to be negligent.

The trial court relied on an additional reason for allowing the expert's opinion about causally unrelated breaches, finding that "the conduct by the defendant sought to be

excluded is all part of the *res gestae* of the claims before the Court." *Rock*, 308 Mich App at 169. However, this Court recently held that MRE 404(b)(1) does not have a res gestae exception. *Jackson*, 498 Mich at 240. Under the rule's plain language, the dispositive question is whether the evidence relates to acts "other than the 'conduct at issue in the case' . . . ." *Id.* at 274-275. *Jackson* makes it clear that other-acts evidence is not exempt from the rule because it may also be part of the res gestae. *Id*. at 274.

The Court of Appeals saved an equally unsupported theory for a footnote—one not advanced by the plaintiff or found in the trial court's opinion:

> In addition to proving proximate causation, plaintiff must prove that defendant's treatment of him was negligent. And, as the trial court noted, whether defendant understood the proper use of the surgical plates and screws and whether he understood when plaintiff could safely bear weight on his ankle, are relevant to his competency in treating this injury. *Id*. at 170 n 8.

The problem with this theory is that a physician's general competence is *not relevant* in a malpractice action. A poor or even incompetent physician can correctly perform a procedure, and an excellent, extraordinarily competent physician may negligently perform one. The only relevant question is whether a physician failed to comply with the applicable standard of care in a way that proximately caused injury to the plaintiff. MCL 600.2912a(1). *Jones v Porretta*, 428 Mich 132, 152; 405 NW2d 863 (1987)("universally recognized propositions that the mere fact of a poor or unsuccessful result does not raise a presumption or inference of negligence, does not constitute evidence in itself of negligence, does not establish a prima facie case, and does not shift to the defendant the necessity of carrying the burden of proof or going forward with the evidence"; quoting 162 ALR 1265, 1276).

The same is true as to the physician's understanding of the clinical issues. A well-qualified, board-certified specialist may have an exhaustive understanding of a particular procedure, but still negligently perform it in a particular case. Conversely, a physician may properly carry out an unfamiliar procedure. See, *Stevens v Stevens*, 355 Mich 363, 372; 94 NW2d 858 (1959)(negligence is determined by "examin[ing] the external conduct of the defendant, not his state of mind").

B. Excluding opinions and arguments about causally unrelated breaches will not interfere with a plaintiff's ability to present relevant and otherwise admissible facts about a defendant's care.

When applying the general exclusion of propensity evidence, it is important to examine the nature of the proffered evidence and its intended purpose. MRE 404(b) only applies to evidence of "acts 'other' than the 'conduct at issue in the case' that risks an impermissible character-to-conduct inference." *Jackson*, 498 Mich at 262. There is a difference between factual evidence about a defendant's actions and expert opinion about a defendant's breach of the standard of care.

In this case, telling the jury what was done during the surgery could be helpful to understanding the facts. Details about the surgery, including defendant's use of the plate/screw configuration, would presumably be in the operative report and other medical records. Evidence about what a defendant did does not necessarily implicate MRE 404(b) in a malpractice case. Nothing about the facts relating to defendant's choice of surgical technique in this case "risks an impermissible character-to-conduct inference." *Jackson*, 498 Mich at 262. This factual evidence does not show, or even imply, that defendant tends to be negligent.

In contrast, the expert's opinion about causally unrelated breaches does create—and is intended to create—the character-to-conduct inference prohibited by MRE 404(b). Plaintiff's expert does not just explain what happened; instead, he asserts defendant was negligent in specific ways that did not proximately cause plaintiff's injuries. Plaintiff will rely on that opinion to argue that the jury should conclude defendant was also negligent in the aspects of his treatment that were causally connected.

The rule against propensity evidence is violated by the expert's opinions and plaintiff's argument based on those opinions. Excluding opinions and arguments about causally unrelated breaches under MRE 404(b) will not prevent a plaintiff from presenting relevant and otherwise admissible facts.

II. Trial courts and litigants would benefit from a bright-line rule excluding evidence of causally unrelated breaches as a matter of law.

Leaving the question of admissibility to the "calculus of probative value and prejudicial effect," as the Court of Appeals directed, would not resolve this important issue. *Rock*, 308 Mich App at 170. MRE 403 is not the same as MRE 404(b). Unless and until a plaintiff meets the threshold burden of showing a non-propensity purpose for other-acts evidence under MRE 404(b)(1), a trial court is not permitted to engage in the balancing required under MRE 403. *People v Mardlin*, 487 Mich 609, 615-616; 790 NW2d 607 (2010).

This Court has enforced a clear principle under MRE 404(b)(1), which "is a rule of legal relevance" that excludes evidence of other acts when offered to show a party's propensity. *Jackson*, 498 Mich at 259. The proponent of other-acts evidence is required to show it "is *not* simply evidence of the defendant's character or relevant to his propensity to act in conformance with his character." *Id.* (quoting *Mardlin*, 487 Mich at 615-616; emphasis in original). Without evidence of a causal connection, a plaintiff will not be able

to meet that burden, and the evidence should be excluded without the need to undertake the balancing under MRE 403.[3] Trial courts should not be required, or permitted, to decide shades or degrees of propensity.

Without a bright-line rule, the burden on courts, jurors and parties will be substantial. The Court of Appeals' holding will encourage a shotgun approach to malpractice litigation. In many cases, plaintiffs will allege and try to prove every conceivable error during the course of treatment notwithstanding the lack of any causal relationship between the alleged breaches and claimed injuries. A plaintiff seeking to prove multiple breaches will need expert support, leading to extended discovery depositions and lengthier trial testimony, increased costs on all parties, and additional burdens on jurors' time and court dockets. In turn, the defendant will obtain opinions from experts who believe there were no breaches, further adding to the expense and burden. Depending on the particular case, multiple experts might be required as the universe of alleged breaches expands beyond any actionable theory of causation.

The disputes over expert witnesses that commonly occur before, during and after trial would increase correspondingly. In particular, trial courts would be required to determine if other causally unrelated breaches tend to show the defendant was more likely to be negligent in the causative act, and if so, whether the danger of unfair prejudice, confusion of issues, or waste of time substantially outweigh the probative value. These concerns would multiply exponentially in cases involving several defendants in different

[3] It is difficult to fathom how the permissible purposes for other-acts evidence listed in MRE 404(b)(1) could be material in a malpractice action. In any event, none of these reasons has been asserted in this case.

professions or specialties, especially when the care and treatment extended over days or weeks.

The Court of Appeals' opinion places no limits on what evidence might have "any tendency" to show a defendant's propensity for negligence under MRE 401. How close in time or how similar in nature would the other alleged breaches have to be? Would a non-causal breach in a preoperative evaluation show the likelihood of negligence during surgery? Would a failure to diagnose that did not cause injury (such as a slow-growing prostate cancer) show negligence in choosing treatment options? Would negligence in treating other patients be allowed?[4]

Moreover, allowing evidence of other non-causative breaches to show negligence creates a fairness concern. To counter the plaintiff's desired inference of a propensity to commit malpractice, a defendant physician would legitimately want to present expert testimony that other aspects of care, also unrelated to causation, were properly performed to support an opposite inference of due care. The same burdens and distractions would be repeated.

A bright-line rule would eliminate the need to consider these questions, which essentially ask nothing more than what is sufficient to show a propensity to act negligently.

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[4] Courts in other jurisdictions have rejected attempts to prove or disprove malpractice through evidence about similar treatment of other patients. *Kunnanz v Edge*, 515 NW2d 167, 171 (ND 1994)(excluded evidence of error in other surgery); *Lund v McEnerney*, 495 NW2d 730, 734 (Iowa 1993)(excluding evidence of injuries to other patients); *Bair v Callahan,* 664 F3d 1225, 1229 (CA 8, 2012)(excluding evidence about misplacement of surgical screws in other procedures); *Buford v Howe*, 10 F3d 1184, 1188-1189 (CA 5, 1994)(excluding evidence of other surgeries); *Hinson v Clairemont Cmty Hosp*, 218 Cal App 3d 1110, 1122; 267 Cal Rptr 503 (1990)(prior negligence in medical treatment is inadmissible negligence), disapproved on other grds, *Alexander v Superior Ct*, 5 Cal 4th 1218, 1228 n 10; 859 P2d 96 (1993).

MRE 404(b)(1) provides the answer and excludes propensity evidence. In short, it would focus the jury on the only question the Legislature has tasked it with deciding. MCL 600.2912a.

A bright-line rule would also advance the more fundamental concern for the truth-seeking mission of litigation. The goal in any malpractice case is to correctly decide whether a plaintiff has suffered injury as a proximate result of a defendant's negligence. Jurors in a malpractice action should not be distracted from the already difficult task at hand, and should not be forced unnecessarily to sort through complex medical issues and weigh expert opinions on questions that are unrelated to a plaintiff's claimed injuries.

The Court of Appeals' broad ruling would allow propensity evidence to substitute for sufficient proof of the core requirement for liability: a breach of the standard of care proximately causing injury to the plaintiff. A jury could be unpersuaded by the plaintiff's expert's opinion that a physician was negligent when performing the act causally related to the plaintiff's injury. However, the jury could be firmly convinced that the plaintiff's expert is right about other acts by the physician, and rely on that opinion to carry the day. This temptation will be extraordinarily hard to resist where evidence of a breach causing injury is weak or absent, but there is a very sympathetic plaintiff.

Indeed, the rationale adopted by the Court of Appeals, taken to its logical conclusion, would allow a plaintiff to prevail without *any* expert opinion that the defendant breached the standard of care as to the causative act. If the expert testified that a defendant was negligent in other causally unrelated acts, that evidence would support an inference that the defendant was also negligent as to the causative act. The inference drawn from

propensity evidence would be itself sufficient to establish a prima facie case and support a verdict.

CONCLUSION

The Court of Appeals erred by holding that evidence about causally unrelated breaches of the standard of care may be admitted to show a defendant was also negligent as to the act proximately causing a plaintiff's injury. The opinions by plaintiff's expert were inadmissible as a matter of law under MRE 404(b), which prohibits evidence of other acts to prove a person's propensity. A bright-line rule should be adopted to ensure that jurors in malpractice actions keep their focus on the relevant question, *i.e.*, whether the plaintiff suffered an injury proximately caused by a defendant's breach of the standard of care.

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